UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

In re the Matter of Martha McMinn, Attorney at Law, Respondent,	No. 02-4066MC **ORDER ON SANCTIONS**

I. INTRODUCTION

This matter concerns a willful violation of a discovery order entered by this court in a criminal case, *United States v. Nelson*, CR01-4074-MWB.[1] The violation was by an attorney representing a defendant in the case. By its very nature, this is a troublesome and serious matter.

On September 9, 2002, attorney Martha McMinn was ordered to appear before the court on September 19, 2002, to show cause why she should not be sanctioned by the court for violating the order. At the request of Ms. McMinn, the hearing was continued to October 10, 2002. On that date, Ms. McMinn appeared in court with her attorney Donald B. Fiedler. The United States also appeared at the hearing, represented by Assistant United States Attorney Jamie Bowers. On October 28, 2002, Mr. Fiedler filed a Memorandum of Points and Authorities in support of Ms. McMinn. (Doc. No. 10) The court now considers the matter to be fully submitted.

[1] All references in this order to docket numbers are to filings in the *Nelson* case.

II. FACTUAL BACKGROUND

There are no real factual disputes in this matter. On August 23, 2001, Robert Nelson and two other defendants, Shane Carlson and Renee Carlson, were indicted on drug conspiracy charges. On September 5, 2001, Renee Carlson was arraigned on the indictment, and at the arraignment the parties stipulated the court should enter the standard "stipulated discovery order" routinely entered in criminal cases filed in this district.[2] That same day, a "Trial Scheduling and Management Order" (Doc. No. 25) and a "Stipulated Discovery Order" (Doc. No. 24) were entered in the case with her name, alone, in the caption. On September 18, 2001, Nelson was arraigned on the indictment. The minutes of the arraignment (Doc. No. 26) state that he, too, agreed to the entry of the stipulated discovery order, although no separate order was entered at that time. On September 28, 2001, Shane Carlson was arraigned on the indictment. (Doc. No. 32) He also agreed to the entry of the stipulated discovery order, and another such order was entered in the case with his name, alone, in the caption.[3] (Doc. No. 33).

At the time of his arraignment, Nelson was represented by the Federal Defender's office. On January 11, 2002, the Federal Defender moved to withdraw from representation

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[2]The practice of entering a "stipulated discovery order" in most criminal cases in the district was initiated several years ago. The form order was developed after negotiations between the United States Attorney for the Northern District of Iowa, the Iowa Federal Defender, and representatives of the private defense bar. Since then, at every arraignment counsel have been asked if they wish to agree to the stipulation. The decision on whether to agree to the stipulation is entirely voluntary, and the stipulated discovery order is entered only if both the Government and the defendant agree to the stipulation. Because the order provides for broader discovery than what is otherwise available under federal discovery rules and procedures, the parties routinely ask the court to enter the order. The stipulated discovery order is referenced in Local Rule 16.1(a), and is available from the Clerk of Court and on the court's web site.

[3]Neither of the two "Stipulated Discovery Orders" entered in the case has Nelson's name in the caption. However, it is clear from the record that the three defendants all agreed to the entry of the order, and that the stipulated discovery order applied to all parties, including Nelson. Ms. McMinn has not argued to the contrary in her submissions to this court. *See, e.g.*, transcript of October 10, 2002, hearing, page 19.

because of a conflict. The motion was granted, and Ms. McMinn was appointed to represent Nelson. She entered her appearance on January 16, 2002. (Doc. No. 52) Nelson pled guilty on June 3, 2002, before the undersigned magistrate judge, and his plea was accepted by Chief Judge Mark W. Bennett on June 25, 2002. He was given a sentence of 168 months on September 3, 2002.

The stipulated discover orders entered in this case both provided, in part, as follows:

> 4. Grand jury testimony, Jencks Act statements, and any transcription, summary, notes or dictation of discovery material will remain in the sole custody of the party's attorney or the agent working on behalf of the attorney and shall not be left with the defendant. . . . If the attorney for the defendant is subsequently allowed to withdraw from this case, and a new attorney is appointed or retained, . . . [t]he new attorney . . . shall be subject to the terms of this order.

(Doc. Nos. 24 & 33, ¶ 4) Although Ms. McMinn was not Nelson's attorney when the stipulated discovery orders were entered in the case, there is no question she was aware of the language in the orders and was aware of the prohibition in the orders against leaving any transcription or notes of grand jury testimony or other discovery materials with her client.[4]

The theory of the Government's case was that the Carlsons were drug dealers, and Nelson was their source of supply. As is typical in such cases, the Government put together a discovery file containing reports, grand jury transcripts, and other materials the Government considered to be relevant to the charges in the indictment. Among these materials was a transcript of grand jury testimony by an informant.

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[4]Ms. McMinn is an experienced criminal defense attorney, and the court is aware that prior to the *Nelson* case, she had represented many defendants in cases where the stipulated discovery order had been entered. At the hearing, Mr. Fiedler represented that when Ms. McMinn appeared for Nelson, she did not receive some of the original documentation and orders from the file, "but being someone that had been on the CJA panel, she was aware of the general discovery order and the order specifically as to grand jury testimony . . . ." Tr. at 12. *See also*, Tr. at 19 ("Martha McMinn, at no point in time, has denied that she violated the order of the Court. . . .").

Under the stipulated standard discovery order, defendants' attorneys are not permitted to make copies of the materials in the discovery file, except as provided by Federal Rule of Criminal Procedure 16. They are, however, permitted to make notes from these materials, and may even dictate and then have transcribed verbatim recitations of the contents of the discovery file.

After Ms. McMinn appeared in the case, she reviewed the Government's discovery files and made detailed notes of their contents. Her notes included a verbatim transcript of portions of the grand jury testimony of the Government informant. Under the terms of the stipulated discovery order, Ms. McMinn was free to show these notes to her client, and to review them with her client in as much detail as she wished. However, the notes, including the transcript she prepared of the informant's grand jury testimony, were not to be "left with the defendant."

While executing a search warrant in a separate criminal case, law enforcement officers recovered various papers that included Ms. McMinn's transcribed notes from the Government's discovery file in the *Nelson* case. A statement on the notes indicate they were prepared on March 6, 2002. Included in these notes was part of the transcript of the informant's testimony. Together with the notes, the officers found an envelope from Nelson, who was in federal custody, addressed to his grandmother. On the envelope were the words "Legal Mail -- Confidential Attorney Client Correspondence." Found with these materials was a letter from Nelson to his grandmother in which Nelson wrote the following:

> Here is a copy of [the informant's] testimony as promised! Please show it to Alicia, Kandy, and anyone else who wants to see it! My trial is June 17th at 9 am. Tell everyone they are all welcome to go if they would like. But I don't have much more to say so I'm going to sign off for now.

Grand Jury Exhibit 1, attached to Gov. Ex. 1 (sealed). At the time, "Alicia" and "Kandy" were targets of an investigation by the Tri-State Drug Task Force. At the hearing,

AUSA Bowers stated his view that the letter was intended to let these targets know what the informant was saying to the grand jury.[5]

After AUSA Bowers learned of what was discovered during the execution of the search warrant, he contacted Ms. McMinn and explained the situation to her. AUSA Bowers and Ms. McMinn immediately advised the undersigned of the situation, and on June 18, 2002, the court permitted Ms. McMinn to withdraw as Nelson's attorney in the case.

At the hearing on the court's order to show cause, Mr. Fiedler pointed out that Nelson was being held in Appleton, Minnesota, a five-hour drive from Sioux City, Iowa, where Ms. McMinn offices. He emphasized the burden on counsel to make a ten-hour round-trip journey to consult with her client. He pointed out the time pressures involved in plea negotiations, where often the first person to agree to cooperate gets the best deal. He also speculated that the prohibition in the stipulated discovery order on defense counsel sharing copies of discovery materials with their clients is routinely violated by attorneys, and argued this situation is different only because Ms. McMinn was honest in admitting her violation. Finally, he observed that Ms. McMinn had every right to discuss with her client the substance of the informant's grand jury testimony, and to show her client her transcript of the testimony and allow him to study it for as long as he wished. Because of this, he questioned whether there was any real harm in permitting Nelson to retain a copy of the transcript.

AUSA Bowers responded by arguing the possession of a transcript of grand jury testimony by a cooperating witness presents a greater risk to the witness than does the mere knowledge the witness is cooperating. As an example, he noted that in this instance, the notes were found in the safe of a person arrested on a drug charge along with a sawed-off

[5]As a result of writing this letter, Nelson received an "obstruction of justice" enhancement at his sentencing hearing.

shotgun and ammunition. He argued that even though the name of the informant was known, she had "plausible deniability." That is, if she were confronted about cooperating, she could claim she was not, in fact, helping the Government. Bowers argues she lost the protection of "plausible deniability" as a result of the dissemination of the transcript of her grand jury testimony.

Ms. McMinn described for the court the difficulty she was having convincing Nelson he should plead guilty rather than go to trial, and then admitted she made a decision she would "always regret" -- to send him her dictation. She did so because although Nelson knew the identity of the informant, he seemed to be having difficulty accepting what the informant was going to say about him at trial, and Ms. McMinn felt Nelson needed to see the transcript on the informant's grand jury testimony to fully understand what the informant would say at trial. Ms. McMinn did not explain why she did not simply travel to Appleton to show Nelson the dictation, but she stated the following:

> There was an understanding that he was, under no circumstances, to allow anyone else to see this, that this was something that I definitely shouldn't be sending to him, but, because I was so concerned about him and his attitude, that I was going to do it. Under no circumstances was he even to allow anyone else there with him to look at these – this particular information that I sent him. He acknowledged that he understood that . . .

Tr. at 28.

III. DISCUSSION

A. Authority to Sanction

This court has the inherent authority to sanction lawyers who willfully and intentionally violate its lawful orders.[6] This authority arises from the power of federal courts to exercise those inherent powers which "are necessary to the exercise of all others," *United States v. Hudson*, 7 (11 Cranch) U.S. 32, 34, 3 L. Ed. 259 (1812), and includes the authority to sanction counsel "who willfully abuse [the] judicial process." *See United States v. Dubon-Otero*, 98 F. Supp. 2d 187, 191 (D.P.R. 2000) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980); *In re Cordova Gonzalez*, 726 F.2d 16, 20 (1st Cir. 1984) (using the court's inherent power to sanction an attorney in a criminal case who withdrew representation eight days before trial); *Ramos Colon v. United States Attorney for Dist. of P.R.*, 576 F.2d 1, 3 (1st Cir. 1978) ("the inherent power of the court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.") (quoting *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir. 1968)); *United States v. Kouri-Perez*, 8 F. Supp. 2d 133, 140 (D.P.R. 1998) (reprimanding defense counsel for inappropriate behavior).

In an order entered by a three-judge panel in *In re Attorney Clifford R. Cronk III*, Misc. No. M1-20 (S.D. Iowa) ("*Cronk*"), the court held as follows:

> This court has "the power to control admission to its bar and to discipline attorneys who appear before it." *Chambers v. Nasco*, 501 U.S. 32, 43 (1991). *See also In re Snyder*, 472 U.S. 634, 643 (1985); *In re Caranchini*, 160 F.3d 420, 423 n.3 (8th Cir. 1998); *In re Attorney Discipline Matter*, 98 F.3d 1082, 1087 (8th Cir. 1996); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 622 (8th Cir. 1987). "Courts have long recognized their authority to suspend or disbar attorneys, an inherent power derived from the attorney's role as an officer of

[6]The court declines to pursue this matter as a criminal contempt under Federal Rule of Criminal Procedure 42(a).

> the court that granted admission." *In re Hoare*, 155 F.3d 937, 940 (8th Cir. 1998).

Id., at 18-19.

When a defense lawyer willfully violates a discovery order in a criminal case, the appropriate sanction is to impose a punishment directly on the lawyer. *People v. Foster*, 271 Ill. App. 3d 562, 567, 648 N.E.2d 337, 340 (1995). *See Taylor v. Illinois*, 484 U.S. 400, 433, 108 S. Ct. 646, 665, 98 L. Ed. 2d 798 (1988) (Justice Brennan dissenting) (sanctioning defense attorney for willful discovery violation in criminal case is effective in deterring future violations of court's discovery orders). *See also State v. Stradley*, 127 Idaho 203, 899 P.2d 416 (1995) (upholding monetary sanction of public defender for violation of court's discovery orders).

Furthermore, in this case, Ms. McMinn was at all material times subject to the Iowa laws and rules governing professional conduct. *See* Local Rule 83.2(g). Therefore, the court can look to the Iowa Code of Professional Responsibility for Lawyers to judge her actions. The misconduct at issue implicates at least two sections of that Code: DR 1-102(A)(5) (conduct prejudicial to the administration of justice), and DR 7-102(A)(8) (conduct contrary to a disciplinary rule).

There is no question under these facts that Ms. McMinn willfully violated the discovery orders entered in the Nelson case. There also is no question that she had no justification to do so. The fact that, in Ms. McMinn's judgment, her client needed to be persuaded to take an offered plea bargain, and she believed he needed to see her notes to be so persuaded, did not justify the willful violation of the court's order. The court is aware of the fact that the location where Nelson was being held was a five-hour drive from Ms. Minn's office, but the court has heard no explanation for why she did not take the time to make the drive to see her client. Also, Ms. McMinn could have requested that Nelson be brought to Sioux City for the purpose of reviewing the discovery file, but she did not do so. Even a good reason for not taking these actions would not, however, justify a willful violation of an order of the court. The court considers the speculation that other attorneys

might routinely violate the terms of the stipulated discovery order to be completely irrelevant to this situation.

B. Sanctions

Having found intentional misconduct of a serious nature has occurred in this matter, and having found that it has the authority to sanction the conduct, the court turns to the issue of the appropriate sanctions.

The court concludes Ms. McMinn's misconduct in the *Nelson* case, though serious, was aberrant behavior. Ms. McMinn has practiced before this court without incident for many years. The court also is impressed that McMinn recognized her error in judgment, brought it to the attention of the court, and accepted that her conduct was inappropriate and in violation of her professional responsibilities.

Martha M. McMinn is hereby **publicly reprimanded** by the court for her misconduct in willfully disregarding the orders of the court. This order shall be filed as a matter of public record on the miscellaneous docket of the court. Copies of this order shall be served upon Ms. McMinn, the United States Attorney for the Northern District of Iowa, the Iowa Federal Defender, and the members of the CJA Panel Selection Committee for the Northern District of Iowa.

Furthermore, Ms. McMinn is hereby removed from the Criminal Justice Reform Act panel of attorneys available for court appointments for six months from the date of her last appointment (*i.e.*, until January 29, 2003[7]).

[7]Ms. McMinn's last appointment from the CJRA panel was on July 29, 2002, and she has not received appointments since that date while the pending matter was resolved.

IT IS SO ORDERED.

DATED this 25th day of November, 2002.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT